

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**ASHER CANDY, INC. and SHERWOOD
BRANDS, INC. LLC, A Single Employer**

and

Case No. 29-CA-26761

**LOCAL 102, BAKERY, CONFECTIONARY,
TOBACCO WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO**

***Nancy Lipin, Esq., Brooklyn, NY, for the General Counsel.
Ray Aquilino, President, Local 102.***

SUPPLEMENTAL DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: On October 24, 2006, the Board issued its Decision, 348 NLRB No. 60 (2006), in which it ordered Asher Candy, Inc. and Sherwood Brands, Inc., LLC, a single employer (Respondents) to (a) on request, bargain in good faith with the Union about the effects of their decision to lay off their employees and close Respondent Asher Candy's facility (b) pay backpay to the laid-off employees and (c) make whole their employees for their failure to pay severance and vacation pay consistent with the terms established by the Union's most recent collective-bargaining agreement with Respondent Asher Candy. The only issue before me is the Respondents' obligation to pay backpay and severance pay.

On November 27, 2007, the United States Court of Appeals for the District of Columbia Circuit entered a judgment (06-1368) enforcing in full the Board's Decision and Order.

On March 28, 2008,¹ a Compliance Specification and Notice of Hearing was issued directing that a hearing be held on May 21, later postponed to May 28. On April 15, Uziel Frydman, the Respondents' president, requested that the hearing be postponed to late July because of his unavailability. Attached to the request was Frydman's detailed itinerary listing international business commitments on various dates from April 22 to mid July. However, his schedule did not list any obligations for the period May 29 through June 14.

Accordingly, on April 24, the Regional Office postponed this hearing to June 4, and extended, to May 12, the Respondents' time to file an answer to the Specification.

On June 1, five weeks after the June 4 date was set and three days before the scheduled hearing, Frydman requested a postponement to July 21 because (a) his request for 46 subpoenas had not been complied with by the Regional Office (b) human resources director Vargulish left on her "summer planned vacation" on May 30 and would not return until June 30

¹ All dates hereafter are in 2008 unless otherwise stated.

(c) he needed additional time to file an answer to the Specification and (d) he will be on vacation in Israel beginning June 14.

Counsel for the General Counsel filed an opposition to the postponement request, joined by the Charging Party. On June 3, Judge Joel Biblowitz faxed an Order denying the request and directing that the hearing proceed on June 4. The fax confirmation notice was received in evidence which stated that it was received by the Respondents.

The hearing was held, as scheduled, on June 4. At the hearing, counsel for the General Counsel stated that she called the Respondents that day and spoke to Frydman who told her that he would not be present at the hearing, but that he intended to appeal Judge Biblowitz' Order and also assert other "irregularities" by the Regional Office. No appearance at the hearing was made by the Respondents. At the hearing counsel for the General Counsel moved for a default judgment on the ground that the Respondents had not filed an answer to the Specification.

The Request for Postponement

I affirm Judge Biblowitz' denial of the Respondents' request for postponement.

First, the Respondents claim that 46 subpoenas they requested were not received. Evidence received at the hearing establishes that the 46 subpoenas were sent by the Regional Office on May 22 by FedEx. Delivery was attempted at 11:10 a.m. on May 23, but according to a FedEx document the "customer was not available or business closed." Indeed, Frydman asserts in his June 1 letter that the package "came after I left to a meeting out of the office." [sic] Clearly, the subpoenas were delivered during business hours and someone should have been present to accept them. Moreover, another delivery was attempted at 11:26 a.m. on May 27, but according to a letter from FedEx "delivery could not be completed as the consignee refused to accept the parcel."² Clearly, the failure to receive the subpoenas, assuming that is a valid ground for postponement, was the fault of the Respondents.

It should be noted that on May 14, counsel for the General Counsel sent the Respondents 15 subpoenas by regular mail. Those subpoenas, sent to the Respondents' correct address, were not returned by the Postal Service. Respondents denied receiving them.

Second, the fact that human resources director Vargulish left on a "planned vacation" on May 30 is not a valid reason for the request. The June 4 hearing date was set on April 24, nearly five weeks before Vargulish left. Clearly, if this was indeed a "planned" vacation her departure date would have been known to the Respondents on April 24, and either her vacation could have been rescheduled, or a postponement request, on that ground, could have been made at that time.

Third, the fact that the Respondents needed additional time to file their answer is not a ground to postpone the hearing. The original date for filing an answer was April 18. That date was extended to May 12. Whether the papers subsequently filed constituted a sufficient answer

² Following the hearing, in a letter to Judge Biblowitz dated June 5, Frydman stated that "I was not in the office until the afternoon of May 27, and the clerk at the office who was asked to sign the envelope refused correctly to do so because the Fedex envelope was not hear marked to SHERWOOD but to me personally and no signature was clearly shown on the envelop as a requirement to accept it." [sic] The letter has been included in the evidence file as GC Exhibit 6.

will be discussed below. Finally, the June 4 hearing date would not have interfered with Frydman's vacation beginning on June 14.

Accordingly, I find that the request for postponement is entirely devoid of merit and was properly denied.

The Motion for Default Judgment

Counsel for the General Counsel maintains that no answer was filed by the Respondents, and at the hearing moved for a default judgment on that ground. The answer was originally due on April 18. The time for filing an answer was thereafter extended to May 12. She advised the Respondents, in writing, that if no answer was filed, she would request summary judgment at the June 4 hearing.

By letters dated May 8 and May 21, the Respondents requested the issuance of subpoenas. The May 8 letter arguably raised a contractual defense to the severance pay part of the Specification. It states that, according to the contract, employees "were not entitled to any severance if they find and or move to another job. Under this contract provision Asher/Sherwood are entitled to find out if the Asher employees were employed after termination by Asher. The above requested subpoenas will be part of the discovery that Sherwood plan to use to discover all facts re the employment of Asher ex-employees after their termination." [sic]

In fact, the contract states as follows:

In the event the Employer ceases to do business as a result of which its employees lose employment in the industry, or in the event of removal of the plant by the Employer to a point beyond commuting distance for a majority of the employees of such plant, severance pay in accordance with the following schedule shall be paid to those employees in the employ of the Employer who have completed the periods of employment with the Employer prescribed in the following schedule.

The Board found that after Respondent Asher closed its New Hyde Park, NY plant on October 29, 2004, "the candy canes formerly manufactured by Respondent Asher are now manufactured at Respondent Sherwood's facilities in Brazil." The Board also found that Respondents Asher and Sherwood are a single employer. Slip op. at 3, 4.

The Specification alleges that pursuant to the parties' contract, employees were entitled to severance pay following the closure of the plant. The Board's Decision directed that the Respondents make their employees whole for their failure to pay severance pay "consistent with the terms established by the Union's most recent collective-bargaining agreement with Respondent Asher Candy..." Slip op. at 1.

It is the General Counsel's burden to prove gross backpay. The Specification sets forth the method of calculation and the calculations for the amounts sought for severance pay, and for backpay pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). At the hearing, counsel for the General Counsel stated that all the computations as to severance pay were made consistent with the terms established by the Union's most recent collective-bargaining agreement with Respondent Asher. The Specification properly sets forth the backpay period. The calculations also properly state the manner in which severance pay was calculated –

multiplying the number of severance weeks each discriminatee was eligible to receive pursuant to the contract by their weekly wage rates which were calculated on the basis of a 40 hour week multiplied by the applicable hourly wage rate.

5 Section 102.56 of the Board's Rules and Regulations requires that as to all matters within the knowledge of the Respondents, including the various factors entering into the computation of gross backpay, the answer shall specifically state the basis for any disagreement, setting forth the Respondents' position as to the applicable premises and furnishing the appropriate supporting figures.

10 The Respondents did not file an answer as to any of the Specification's specific computations concerning gross backpay, including the backpay period, the employees' dates of hire and termination, years of employment with the Respondents, their hourly wage rate, weekly pay, the number of severance weeks they were entitled to as set forth in the contract based on
15 their years of employment, or the precise amounts of backpay and severance pay owed to them. Accordingly, all the gross backpay calculations are undenied, and they are deemed to be true. Section 102.56.

20 According to the contract, the employees were entitled to severance pay if either they lost employment in the industry *or* the plant was removed beyond their commuting distance. It is the Respondents' burden to prove deductions to backpay. *Mastro Plastics*, 136 NLRB 1342, 1346 (1962). Accordingly, it is their burden to prove, according to the contract, that the discriminatees are not entitled to contractual severance pay because they continued to be
25 employed in the industry *and* that the plant was not removed beyond the employees' commuting distance. The Respondents recognized that they had this burden of proof by requesting subpoenas in order to examine records and question their former employees as to jobs they held after the plant closed. However, it appears that, had the Respondents defended this case, it would have been unlikely that they could have proven that their relocated facility in Brazil was within its New York-based employees' commuting distance.

30 Inasmuch as the Respondents did not appear at the hearing to present any evidence as to their defense, I find and conclude that they have not met their burden of proving that the backpay or severance pay amounts were inconsistent with the terms of the contract or that they were inaccurate in any respect. Accordingly, this alleged defense has no merit and it is rejected.

35 Similarly, the Respondents' May 21 letter states that four employees quit in June, 2004 and are not entitled to backpay or severance pay. The letter does not identify the four employees or offer any other evidence of their alleged resignations, and since the Respondents did not appear at the hearing, no such evidence was presented there. Accordingly, the
40 Respondents have not presented any evidence to support this alleged defense, and it is rejected.

Conclusions

45 No sufficient answer having been filed to any of the computations set forth in the Compliance Specification, and no evidence having been presented by the Respondents at the hearing to refute any of the allegations in the Specification, all such allegations are deemed to be admitted to be true and are hereby found to be true. The Respondents shall be obligated to pay to the employees the amounts set forth in Appendices A, B, and C of the Compliance
50 Specification, attached hereto, with interest.

Based on the above, I issue the following recommended³

ORDER

The Respondents, Asher Candy, Inc. and Sherwood Brands, Inc., LLC, a single employer, New Hyde Park, NY, and Rockville, Maryland, their officers, agents, successors, and assigns, shall make whole the employees set forth in the attached Appendices A, B, and C, and in the amounts set forth there, plus interest accrued to the date of such payment, minus the tax withholdings required by Federal, State and Local laws.

Dated, Washington, D.C., June 18, 2008.

Steven Davis
Administrative Law Judge

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix A

Asher Candy, Inc.: Years of Service/Severance Weeks

Last Name	First Name	Date of Hire	Date of Term	Employment Years Met	Severance Weeks
Adriem	Marise	6/16/1975	10/28/2004	20	15
Arriola	Juan	4/24/1978	10/28/2004	20	15
Arriola	Maria	1/1/1988	10/28/2004	16	12
Arteaga	Jose	7/26/1984	10/21/2004	20	15
Arteaga	Rosinda	3/14/1994	10/21/2004	10	10
Benitez	Concepcion	2/27/1995	10/12/2004	9	6
Calixte	Jean	3/13/1998	10/28/2004	6	3
Carbajal	Yolanda	5/10/1993	10/21/2004	11	10
Castillo	Custudio	8/19/1991	10/21/2004	14	10
Concepcion	Gloria	1/13/1994	10/21/2004	10	10
Debe	Emanette	3/29/1993	10/21/2004	11	10
Debe	Ruben	2/24/1992	10/12/2004	12	10
Duperval	Francoer	7/3/1996	10/12/2004	8	6
Emmanuel	Mimose	7/20/1995	10/12/2004	9	6
Estrada	Angela	3/29/1993	10/21/2004	11	10
Fleurissant	Jean	2/25/1976	10/28/2004	20	15
Flores	Maria	5/18/1995	10/12/2004	9	6
Gomez	Helen	10/27/1988	10/21/2004	15	12
Gomez	Maria	3/12/1992	10/21/2004	12	10
Gonzalez	Maribel	5/11/1993	10/21/2004	11	10
Guevara	Fidel	8/16/1989	10/21/2004	15	12
Guevara	Juana	7/27/1989	10/28/2004	15	12
Jennings	Frederick	5/9/1988	10/21/2004	16	12
Johnson	Susan	6/9/1975	10/28/2004	20	15
Johnson	Timothy	6/20/1995	10/12/2004	9	6
Martinez	Rosa	11/19/1990	10/28/2004	13	10
Miranda	Reyna	10/25/1988	10/28/2004	16	12
Morgan	Donald	6/18/1984	2/2/2005	20	15
Myrthil	Jeanina	7/18/1995	10/12/2004	9	6
Oliver	Anthony	1/7/1997	10/21/2004	7	3
Ortiz	Marcos	4/5/1978	10/28/2004	20	15
Perez	Olivia	6/21/1984	10/28/2004	20	15
Pierre	Gerard	5/20/1974	1/11/2005	20	15
Quintanilla	Ana	7/17/1995	10/12/2004	9	6
Regina	Francesco	8/24/1994	10/28/2004	10	10
Rosa	Marinela	9/24/1990	10/21/2004	14	10
Salmeron	Maria	3/29/1993	10/21/2004	11	10
Shiwnarain	Puran	11/25/1985	10/12/2004	18	12
Stevens	Angela	3/31/1981	10/28/2004	20	15
Strachan	David	1/29/1980	1/31/2005	20	15
Tummings	John	2/24/1975	1/31/2005	20	15
Ventura	Sylvia	5/17/1995	10/12/2004	9	6
Waldron	Kenmore	4/26/1971	2/2/2005	20	15
Washington	Mae	6/30/1975	10/28/2004	20	15
Watson	Brenda	8/15/1966	10/28/2004	20	15
Williams	Merrell	2/10/1982	10/26/2004	20	15

Appendix B**Asher Candy, Inc.: Hourly Rates and Weekly Pay**

Last Name	First Name	Hourly Rate	Weekly Pay
Adriem	Marise	14.26	570.40
Arriola	Juan	15.46	618.40
Arriola	Maria	10.36	414.40
Arteaga	Jose	13.13	525.20
Arteaga	Rosinda	7.65	306.00
Benitez	Concepcion	7.50	300.00
Calixte	Jean	7.85	314.00
Carbajal	Yolanda	7.80	312.00
Castillo	Custudio	9.40	376.00
Concepcion	Gloria	7.60	304.00
Debe	Emanette	7.80	312.00
Debe	Ruben	8.85	354.00
Duperval	Francoer	7.10	284.00
Emmanuel	Mimose	7.50	300.00
Estrada	Angela	7.80	312.00
Fleurissant	Jean	15.20	608.00
Flores	Maria	7.50	300.00
Gomez	Helen	9.80	392.00
Gomez	Maria	7.80	312.00
Gonzalez	Maribel	7.80	312.00
Guevara	Fidel	10.30	412.00
Guevara	Juana	9.30	372.00
Jennings	Frederick	11.55	462.00
Johnson	Susan	14.01	560.40
Johnson	Timothy	9.60	384.00
Martinez	Rosa	8.80	352.00
Miranda	Reyna	9.80	392.00
Morgan	Donald	12.82	512.80
Myrthil	Jeanina	7.10	284.00
Oliver	Anthony	9.05	362.00
Ortiz	Marcos	15.29	611.60
Perez	Olivia	11.16	446.40
Pierre	Gerard	14.37	574.80
Quintanilla	Ana	7.65	306.00
Regina	Francesco	9.80	392.00
Rosa	Marinela	11.80	472.00
Salmeron	Maria	7.80	312.00
Shiwnarain	Puran	16.16	646.40
Stevens	Angela	12.88	515.20
Strachan	David	17.85	714.00
Tummings	John	20.71	828.40
Ventura	Sylvia	7.50	300.00
Waldron	Kenmore	15.97	638.80
Washington	Mae	14.01	560.40
Watson	Brenda	14.78	591.20
Williams	Merrell	13.50	540.00

Appendix C

Asher Candy, Inc.: Severance and Transmarine Monies Owed

Last Name	First Name	Hourly Rate	Weekly Pay	Severance Weeks	Severance Payout	Transmarine	Total
Adriem	Marise	14.26	570.40	15	8,556.00	1,140.80	9,696.80
Arriola	Juan	15.46	618.40	15	9,276.00	1,236.80	10,512.80
Arriola	Maria	10.36	414.40	12	4,972.80	828.80	5,801.60
Arteaga	Jose	13.13	525.20	15	7,878.00	1,050.40	8,928.40
Arteaga	Rosinda	7.65	306.00	10	3,060.00	612.00	3,672.00
Benitez	Concepcion	7.50	300.00	6	1,800.00	600.00	2,400.00
Calixte	Jean	7.85	314.00	3	942.00	628.00	1,570.00
Carbajal	Yolanda	7.80	312.00	10	3,120.00	624.00	3,744.00
Castillo	Custudio	9.40	376.00	10	3,760.00	752.00	4,512.00
Concepcion	Gloria	7.60	304.00	10	3,040.00	608.00	3,648.00
Debe	Emanette	7.80	312.00	10	3,120.00	624.00	3,744.00
Debe	Ruben	8.85	354.00	10	3,540.00	708.00	4,248.00
Duperval	Francoer	7.10	284.00	6	1,704.00	568.00	2,272.00
Emmanuel	Mimose	7.50	300.00	6	1,800.00	600.00	2,400.00
Estrada	Angela	7.80	312.00	10	3,120.00	624.00	3,744.00
Fleurissant	Jean	15.20	608.00	15	9,120.00	1,216.00	10,336.00
Flores	Maria	7.50	300.00	6	1,800.00	600.00	2,400.00
Gomez	Helen	9.80	392.00	12	4,704.00	784.00	5,488.00
Gomez	Maria	7.80	312.00	10	3,120.00	624.00	3,744.00
Gonzalez	Maribel	7.80	312.00	10	3,120.00	624.00	3,744.00
Guevara	Fidel	10.30	412.00	12	4,944.00	824.00	5,768.00
Guevara	Juana	9.30	372.00	12	4,464.00	744.00	5,208.00
Jennings	Frederick	11.55	462.00	12	5,544.00	924.00	6,468.00
Johnson	Susan	14.01	560.40	15	8,406.00	1,120.80	9,526.80
Johnson	Timothy	9.60	384.00	6	2,304.00	768.00	3,072.00
Martinez	Rosa	8.80	352.00	10	3,520.00	704.00	4,224.00
Miranda	Reyna	9.80	392.00	12	4,704.00	784.00	5,488.00
Morgan	Donald	12.82	512.80	15	7,692.00	1,025.60	8,717.60
Myrthil	Jeanina	7.10	284.00	6	1,704.00	568.00	2,272.00
Oliver	Anthony	9.05	362.00	3	1,086.00	724.00	1,810.00
Ortiz	Marcos	15.29	611.60	15	9,174.00	1,223.20	10,397.20
Perez	Olivia	11.16	446.40	15	6,696.00	892.80	7,588.80
Pierre	Gerard	14.37	574.80	15	8,622.00	1,149.60	9,771.60
Quintanilla	Ana	7.65	306.00	6	1,836.00	612.00	2,448.00
Regina	Francesco	9.80	392.00	10	3,920.00	784.00	4,704.00
Rosa	Marinela	11.80	472.00	10	4,720.00	944.00	5,664.00
Salmeron	Maria	7.80	312.00	10	3,120.00	624.00	3,744.00
Shiwnarain	Puran	16.16	646.40	12	7,756.80	1,292.80	9,049.60
Stevens	Angela	12.88	515.20	15	7,728.00	1,030.40	8,758.40
Strachan	David	17.85	714.00	15	10,710.00	1,428.00	12,138.00
Tummings	John	20.71	828.40	15	12,426.00	1,656.80	14,082.80
Ventrua	Sylvia	7.50	300.00	6	1,800.00	600.00	2,400.00
Waldron	Kenmore	15.97	638.80	15	9,582.00	1,277.60	10,859.60
Washington	Mae	14.01	560.40	15	8,406.00	1,120.80	9,526.80
Watson	Brenda	14.78	591.20	15	8,868.00	1,182.40	10,050.40
Williams	Merrell	13.50	540.00	15	8,100.00	1,080.00	9,180.00
Total					239,385.60	40,137.60	279,523.20